Petition

No. 81-193

Office-Supreme Court, U.S.
FILED
JUL 24 1981
ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

October Term, 1981

WALTER MUND,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE TERM, FIRST DEPARTMENT

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QUESTIONS PRESENTED

1. Whether petitioner's constitutional rights were violated under the First and Fourteenth Amendments, by his arrest and conviction for harassment predicated upon his utterance of allegedly obscene words to a police officer who sought to arrest him because his automobile alarm system was making noise?

2. Whether any statute making it a crime to utter profanity in the presence of a police officer is constitutional within the purview of the First and Fourteenth Amendments where no physical abuse or threats of physical abuse accompanied the words?

3. Whether the Administrative Code of the City of New York, pertaining to noise pollution, can punish the unintentional sounding of an automobile alarm system where the owner of such automobile was totally unaware of the sounding of the alarm until he approached the vehicle and where he made successful efforts to turn it off immediately after learning of its existence (First, Fifth and Fourteenth Amendments, U.S. Constitution)?

4. Whether petitioner was given a fair trial in view of the fact that the trial court permitted clearly irrelevant evidence to be introduced which had a prejudicial effect upon the petitioner (Fifth and Fourteenth Amendments, U.S. Constitution).

5. Whether the Criminal Court of the City of New York had jurisdiction over the Administrative Code violation, since the Code provides for a "civil penalty"?

THE PARTIES

The parties in the Supreme Court, Appellate Term, First Department, were The People of the State of New York and the petitioner herein.

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE TERM, FIRST DEPARTMENT

OPINION BELOW

A copy of the memorandum decision of the court below is annexed to the petition as an appendix.

JURISDICTION

(a) The judgment of conviction was rendered in the Criminal Court of the City of New York, for the County of New York, on the 20th day of November 1979, after a trial before Bradley, J., and a jury.

The conviction was for the crimes of harassment (Penal Law §240.25) and for violation of New York City Administrative Code §1403.3-4.05 (subd. 4).

(b) The order of affirmance of the Supreme Court of the State of New York, Appellate Term, First Department, is annexed as an appendix and is dated May 11, 1981.

A certificate denying leave to appeal to the Court of Appeals of the State of New York, dated June 19, 1981, was issued by Associate Judge Jacob D. Fuchsberg of the Court of Appeals and is also annexed as an appendix herein.

(c) Jurisdiction to review the judgment in question by certiorari is conferred under 28 U.S.C. §§1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the Due Process Clause of the Fourteenth Amendment, to wit, ". . . nor shall any State deprive any person of life, liberty or property without due process of law"; the Fifth Amendment, ". . . nor be deprived of life, liberty or property without due process of law"; and the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercises thereof; or abridging the freedom of speech . . . ."

In addition, the statutory provisions are the following:

Section 1403.3-4.05 (subd. 4) of the Administrative Code of the City of New York reads, *inter alia,* as follows:

> "No owner . . . of a motor vehicle shall have in operation an audible burglar alarm thereon

> unless such burglar alarm shall be capable of and shall automatically terminate its operation within . . . ten minutes . . .; notwithstanding this provision, any member of the police department . . . shall have the right...to disconnect any such alarm . . . at any time during the period of its activation . . . ."

Section 1403.3-8.01 (subd. b, Par. [5]) provides for a civil penalty only for a violation of Section 1403.3-4.05 (subd. 4), and states, *inter alia:*

> "§1403.3-8.01 Powers of the board.—(a) The board, in addition to other duties assigned to it by law, shall have the power to conduct hearings pursuant to this article and, by the issuance of a subpoena, compel the attendance of witnesses and the production of any books, papers or other things relating to the matter under investigation.
>
> (b) The board may, upon notice pursuant to section 8.05 of this code, and after a hearing pursuant to section 8.13 of this code, or in default thereof pursuant to section 8.15 of this code:
>
> • • •
>
> (5) Impose a civil penalty in each instance in an amount no greater than as set out in table V against any person who violates a provision of this code, or any order or regulation promulgated by the administrator or the board."

Another statute pertaining to the petition is Penal Law Section 2[illegible].25 (subd. 2), which reads, *inter alia:*

"§240.25 Harassment.

A person is guilty of harassment when, with intent to harass, annoy or alarm another person:

* * *

2. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or

* * *

Harassment is a violation."

STATEMENT OF THE CASE

Walter Mund, the petitioner herein, age 59, is an attorney-at-law licensed to practice in the State of New York and has been in good standing at the bar for 29 years.

At about 7:00 P.M. on April 16, 1979, as petitioner, together with two other individuals, was returning to his legally parked automobile, he perceived that the car's burglar alarm system had been activated. Petitioner immediately turned off the alarm with a special key and was suddenly accosted by a New York City policewoman who demanded to see Mund's driver's license and registration.

Some words were exchanged and the petitioner and the police officer exchanged epithets. No physical contact or threat of physical contact occurred, but the petitioner allegedly told the officer "You've got to be kidding. Get the fuck out of here . . . . Fuck you baby." (118, 119).[1]

1. Numerals in parentheses refer to pages of the official court reporter's minutes of the record, unless otherwise indicated.

The foregoing recollection of what was said emanated solely from the lips of the police officer involved, namely Police Officer Povelaitis.

Another officer present was Officer Pagan.

Both officers conceded that none of the words put them in any fear. Petitioner was then arrested and handcuffed and taken to Central Booking (29, 121-122).

Petitioner stated, when he took the stand in his own defense, that he did not hurl the verbal epithets claimed by the officers and that he was accompanied by his son, Gary Mund, and another attorney-at-law, Joel Meadows (151). As the trio approached Mund's automobile, they heard the burglar alarm. He stooped to turn off the alarm.

As petitioner got up, he was met by Officer Povelaitis who demanded his license and registration (154). He asked "why" and she told him to "[c]ut the shit. Give me your license and registration or I'll lock you up" (*ibid.*). More words were exchanged and petitioner agreed to follow the officers down to the Ninth Precinct.

The officers were not satisfied, however; they removed petitioner from his car and handcuffed him (155-156). Petitioner overheard Povelaitis ask Pagan: "You are going to back me on this one, aren't you" (159). Petitioner denied using any profanities (159-161).

Joel Meadows, also an attorney (81), and Gary Mund, corroborated petitioner's testimony (87-91, 123-132).

Petitioner was treated like a dangerous felon. He was handcuffed, strip-searched, and even made to spread the cheeks of his buttocks (163-164).

Petitioner was handcuffed with his hands behind him (165, 166).

Sergeant Condon did not allow Mund to even complete a telephone call seeking aid of counsel (166, 167). The sergeant pulled the telephone away from petitioner (167).

Incredibly, petitioner who was a lawyer and of advanced age, was kept in handcuffs for hours on end, with his hands behind him, even while he was locked in a detention cell (171-172).

Twenty-five hours after his arrest, Mund was first told why he was arrested (172, 173).

Gary Mund noticed that petitioner's wrists were all cut up and bleeding from the cuffs (134).

REASONS FOR GRANTING THE WRIT

I.

It was violative of petitioner's constitutional rights under the First and Fourteenth Amendments to have arrested him for harrassment based upon alleged verbal epithets which he addressed to the arresting officer, which words were not accompanied by any threat of force or violence and which the officers conceded did not place them in fear. Words alone, not amounting to threats or disturbances of the peace, cannot constitutionally be the subject of punishment under the First and Fourteenth Amendments of the United States Constitution.

While we recognize that governments such as the City of New York may have a legitimate interest in keeping the community quiet, and especially in areas such as those immediately adjacent to or surrounding hospitals, convalescent homes, schools, places of worship, and so forth, this interest must be rationalized with the guarantees of free expression and free speech, as expressed in the First and Fourteenth Amendments.

An individual has a legitimate interest in being able to express his thoughts and ideas. In a society such as ours it is imperative that avenues of communication be kept open between the citizen and other persons, including the government, the police and so forth.

The Supreme Court of the United States has consistently recognized "the inherent value of free discourse" (*Dennis v. United States,* 341 U.S. 494, 71 S. Ct. 857, *reh. den.* 342 U.S. 842, 72 S. Ct. 20, *reh. den.* 355 U.S. 936, 78 S. Ct. 409; *Cantwell v. Connecticut,* 310 U.S. 296, 84 L. Ed. 1213, 1219, 1220, 128 A.L.R. 1352.

It has been recognized that "letting off steam" through society's institutionalized safety valves may be necessary in order to prevent conduct much more irrational and destructive.

In a pluralistic polyglot society, such as twentieth century America, we can feel fortunate that there is such a general consensus that the First Amendment rights are, as the Supreme Court has continually held, fundamental.

Unfettered free speech is a fundamental right guaranteed by the First Amendment and by the Fourteenth Amendment, which encompasses the First Amendment. *See SAIA v. New York,* 334 U.S. 558, 68 S. Ct. 1148.

In *Kovacs v. Cooper,* 336 U.S. 77, 69 S. Ct. 448, 93 L. Ed. 513, 518, *reh. den.* 336 U.S. 921, 69 S. Ct. 638, the Supreme Court recognized that a "loud and raucous" noise from a sound amplifier or sound truck could be the subject of control under certain circumstances.

State courts have invalidated anti-noise and sound truck ordinances when they permitted convictions without proof that the speaker unreasonably interfered with the peace and quiet of other citizens (*Haggerty v. Fresno County,* 267 P. 2d 370, *Haggerty v. Associated Farmers of California,* 44 Cal. 2d 60, 279 P. 2d 734, superseding 267 P. 2d 370. *See also, Commonwealth v. Jacobs,* 333 Mass. 204, 129 N.E. 2d 620).

The Supreme Court, on many occasions, has affirmed that legislative controls upon the exercise of First Amendment freedoms will be invalidated when they suffer from overbreadth. Moreover, "a defendant's standing to challenge a statute on First Amendment grounds as facially overbroad does not depend upon whether his own activity is shown to be constitutionally privileged" (*Bigelow v. Virginia,* 421 U.S. 809, 95 S. Ct. 2222).

"The court has consistently permitted attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity". *(Bigelow v. Virginia, supra).*

In the case at bar, it must be borne in mind that there was no evidence that the noise emanating from the defendant-petitioner in any way disturbed the peace or any community activity such as a school, hospital, convalescent home, or the like. (*See Grayned v. Rockford,* 408 U.S. 104, 92 S. Ct. 2294).

There was no evidence in the case at bar that the defendant-petitioner was disorderly, since in the discussion we now are undertaking concerning the conviction for harassment, there was nothing other than some epithets hurled at the officers. Thus, the Supreme Court has held consistently that where there is no proof in the record that petitioner's conduct was disorderly, a conviction for general First Amendment conduct would be set aside (*Gregory v. Chicago,* 394 U.S. 111, 89 S. Ct. 946).

Indeed, when *attempts have been made to restrain free speech* or to punish free speech, the Supreme Court has declared that *the speaker may ignore such statute with impunity* in the exercise of his right of free expression (*Shuttlesworth v. Birmingham,* 394 U.S. 147, 89 S. Ct. 935).

Additionally, there were no "fighting words" uttered by petitioner and proscribing "opprobrious" language is unconstitutional (*Lewis v. New Orleans,* 415 U.S. 130, 94 S. Ct. 970).

So strong are the guarantees of free speech and expression, that the Supreme Court has held that a State cannot forbid or proscribe advocacy of the use of force or of law violations,

except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action (*Brandenburg v. Ohio,* 395 U.S. 444, 23 L. Ed. 2d 430, 434).

Relatively recently, the Supreme Court reversed the conviction of an individual participating in a demonstration who stated within the hearing of a Sheriff *"We'll take the fucking street later"* or *"We'll take the fucking street again"* (*Hess v. Indiana,* 414 U.S. 105, 94 S. Ct. 326).

We must bear in mind that there was no evidence herein that the petitioner obstructed traffic or otherwise interfered with the free exercise of liberty of other persons (*Schneider v. State,* 308 U.S. 147, 84 L. Ed. 155, 163, 164).

The statute involved herein, namely Section 240.25 of the Penal Law of the State of New York, states that "A person is guilty of harassment when, with intent to harass, annoy or alarm another person: . . . 2. in a public place, he uses abusive or obscene language or makes an obscene gesture."

The *statute here is clearly overly broad* because it is the same as talking about "opprobrious language" (*Lewis v. New Orleans, supra*).

Moreover, the facts of the case at bar reveal that the police officers were not threatened and stated that they were not placed in fear. Thus, it is clear that petitioner did not even come within the purview of the harassment statute at all.

The police officer, Povelaitis, herein, without telling the petitioner why she wanted his license and registration, and using opprobrious language of her own, arrested the petitioner for harassment because he said "Fuck you, baby", or words to that

effect. We maintain that this cannot be violative of any statute because it is language protected by the First Amendment.

We therefore ask this Court to declare that no punishment can be inflicted for the conduct herein and that the statute, as applied herein, is unconstitutional.

It should also be borne in mind, most respectfully, that a conviction cannot be sustained on a theory that was not presented to the jury (*Chiarella v. United States*, ___ U.S. ___, 63 L. Ed. 2d 348, 362, and *Rewis v. United States*, 401 U.S. 808, 814).

There is absolutely no proof in the record that petitioner uttered the words in question "with intent to harass, annoy or alarm another person". But, even if there were such proof, it could not be punished under the First Amendment (*Sandstrom v. Montana*, 442 U.S. 510; *People v. Getch*, 50 N.Y. 2d 456).

We remind this Court that in *Lewis v. New Orleans, supra*, the *statute held unconstitutional* stated, *inter alia:*

> "It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duties."

The statute herein is equally or more so unconstitutional.

II.

A violation of the Administrative Code section involved herein could not be prosecuted in the criminal court of the City of New York because it was a civil proceeding and not criminal. Moreover, the statute is unconstitutionally vague.

Petitioner was purportedly "convicted" of violating Section 1403.3-4.05 (subdivision 4) of the Administrative Code.[2] Section 1403.3-8.25(e) of the Administrative Code does provide for criminal proceedings in instances where civil penalties are "not otherwise provided for . . .". But Section 1403.3-8.01 (subd. h, par. [5]), part of the same article, expressly provides for a *civil* penalty of not more than $250 for a violation of Section 1403.3-4.05 (subdivision 4). It is thus evident that jurisdiction is vested in the Environmental Protection Board, not the Criminal Court.

In the only reported case found on point, Judge Gartenstein agreed. As he put it, "a crime [can] only be made out after proceedings before the appropriate administrative board resulting either in an order which is disobeyed or in a civil money penalty which remains unpaid (§1403.3-8.25). Simply stated, there is no crime here, certainly no resort to the criminal courts." (*People v. Markovitz*, 102 Misc. 2d 575, 580).

In *Markovitz*, the court explained (423 N.Y.S. 2d 996 at 999):

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2. Insofar as here applicable, that subdivision provides:

> "No owner . . . of a motor vehicle shall have in operation an audible burglar alarm thereon unless such burglar alarm shall be capable of and shall automatically terminate its operation within . . . ten minutes . . . ; notwithstanding this provision, any member of the police department . . . shall have the right . . . to disconnect any such alarm . . . at any time during the period of its activation . . .".

"Referring to the Administrative Code, section 1403.3-3.01 provides: 'No person shall make, continue or cause or permit to be made or continued any unnecessary noise.' The standards for prohibited noise are contained in §1403.3-4.01 which makes noise actionable only when it violates a specific provision of the Code. Examination of the statutory scheme reveals a methodology of reliance upon decibel levels which are set for certain specified activities, viz., sound reproduction devices, emergency signal devices, exhausts, motor vehicles, aircraft, rapid transit railroads, air compressors, paving breakers, circulation devices. All non-specified activities fall within the ambit of noise level standards to be set by the Administrator (§1403.3-5.23) and prohibited noise is defined solely in terms of 'sound level in excess of the appropriate allowable sound level promulgated by the Administrator . . .' (§1403.3-6.03b). Clearly, therefore, unless it is alleged and proven that specific decibel levels have been promulgated by the Administrator and exceeded by a noise level in excess thereof, viz., a specifically alleged decibel level, no actionable conduct is presented. The bill of particulars, manifesting a total inability on the part of the People to meet this standard of pleading and proof, mandates a ruling that the complaint is fatally defective. Far more significant, however, is the fact that even were the proscribed noise level pleaded and proven, a crime could only be made out after proceedings before the appropriate administrative board resulting either in an order which is disobeyed or in a civil money penalty

> which remains unpaid (§1403.3-8.25). Simply stated, there is no crime here, certainly no resort to the criminal courts."

The theory proffered by Judge Berkman in denying the motion to dismiss, *i.e.*, that the police retain "common law powers" to abate nuisances, may be easily disposed of. True, a nuisance may constitute a common law crime [*see Mayor & Council of Alpine v. Brewster*, 7 N.J. 42, 80 A. 2d 297; 2 Russell, *Crimes*, p. 1692 (8th ed. 1923); Prosser, *Torts*, §88, p. 586 (4th ed. 1971); *cf.*, Penal Law §240.45], but it is well established in this State that the criminal law is strictly statutory; there are no common law crimes [*People v. Ingber*, 248 N.Y. 302, *affg.* 222 App. Div. 804; *People v. Knapp*, 206 N.Y. 373; LaFave & Scott, *Criminal Law*, §9, p. 61 (1972 ed.); Clark & Marshall, *Crimes*, §1.05, p. 31 (7th ed.); Note, *Common Law Crimes in the United States*, 47 Col. L. Rev. 1332].

Accordingly, while the police unquestionably have the power to enforce the "noise pollution" provisions of the Administrative Code, as with traffic infractions (Vehicle and Traffic Law, Article 2-A; *Matter of Rosenthal v. Hartnett*, 36 N.Y. 2d 269), the proper tribunal to adjudicate violations is an administrative agency — the Environmental Protection Board; the Criminal Court has no jurisdiction.

Legislative acts creating crimes must be clear and certain. They must provide reasonable and adequate guidance to a person who would be law-abiding so that he can comprehend what activity is to be avoided (*Winters v. New York*, 333 U.S. 507, 68 S. Ct. 665, conformed to 298 N.Y. 510; *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S. Ct. 618; *United States v. Cardiff*, 344 U.S. 174, 73 S. Ct. 189).

In the language of the Supreme Court, "Criminal statutes must be so precise and unambiguous that the ordinary person

can know how to avoid unlawful conduct." *United States v. Sullivan,* 332 U.S. 689, 92 L. Ed. 297, 301, 302, 68 S. Ct. 331, 334 (1948).

Negatively phrased, regulatory controls cannot be infected with the vice of vagueness.

The demand of certainty and clarity is necessary for many reasons:

(a) persons subject to the law cannot in fairness be exposed to governmental controls which trap them. *People v. O'Gorman,* 274 N.Y. 284, 8 N.E. 2d 862, 110 A.L.R. 1231 (1937);

(b) vague and indefinite regulations deter people from perfectly lawful conduct. *Connor v. Birmingham,* 257 Ala. 588, 60 So. 2d 479 (1952) — especially must this be condemned where freedom of communication is concerned, for here society itself is the loser in being deprived of new ideas and literature. *Winters v. New York,* 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665, conformed to 298 N.Y. 510, 80 N.E. 2d 659; *State v. Pocras,* 166 Neb. 642, 90 N.W. 2d 263 (1958);

(c) vague laws give public servants opportunities to apply the law arbitrarily, with favoritism, and with invidious discrimination, as they please. *Oregon Box & Mfg. Co. v. Jones Lumber Co.,* 117 Or. 411, 244 P. 313 (1926);

(d) when charged with violation of the statute or ordinance, a citizen must have reasonable information of the charge against him, so that he can plead to it and prepare a defense against it. *Dunn v. Wilmington,* 212 A. 2d 596, *aff'd* 219 A. 2d 153 (Del. Sup. 1965);

(e) juries and judges can not reasonably come to conclusions of guilt or innocence when it is uncertain what the

lawmakers intended to proscribe. *Cf., Sea Isle City v. Vinci,* 34 N.J. Super. 273, 112 A. 2d 18 (1955); *People v. Caswell-Massey Co.,* 6 N.Y. 2d 497, 190 N.Y.S. 2d 649, 160 N.E. 2d 895 (1959); *Cleveland v. Baker,* 83 Ohio L. Abs. 502, 167 N.E. 2d 119 (App. 1960); and

(f) unless it is certain for what a citizen is being punished, the rule against double jeopardy is ineffective. *Cf., Dunn v. Wilmington,* 212 A. 2d 596, *aff'd* 219 A. 2d 153 (Del. Sup. 1965); *State v. Caez,* 81 N.J. Super. 315, 195 A. 2d 496 (1963).

In vacating a conviction under a Utah statute permitting the punishment of those who conspire "to commit acts injurious to public morals," the Supreme Court stated: "Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." *Musser v. Utah,* 333 U.S. 95, 92 L. Ed. 562, 565, 68 S. Ct. 397, 398 (1948).

Courts will set aside convictions under statutes and ordinances which were unduly vague and which did not adequately warn the defendants that their conduct would be criminal. *Bouie v. Columbia,* 378 U.S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964).

Where First Amendment rights are involved an even greater degree of specificity is required (Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612; and *see also, Palmer v. Euclid,* 402 U.S. 544, 91 S. Ct. 1563).

III.

The petitioner was deprived of due process of law and a fair trial when the court concededly improperly allowed evidence of prejudicial and irrelevant events which had nothing whatsoever to do with the trial and then telling the jury to disregard them.

That a defendant is entitled to a trial in accordance with the precepts of the Due Process Clause is elementary. Juries, however, cannot perform mental gymnastics by being told to ignore highly prejudicial events which should never have been introduced in the first place (*Bruton v. United States,* 391 U.S. 123, 88 S. Ct. 1620; *Roberts v. Russell,* 392 U.S. 293, 88 S. Ct. 1921).

Thus, it was highly prejudicial for the court to adduce totally irrelevant and prejudicial testimony as to what happened after petitioner's arrest at Central Booking and then tell the jury to disregard that evidence.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

CERTIFICATE DENYING LEAVE DATED JUNE 19, 1981

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

JOHN DOE a/k/a WALTER MUND

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
June 19, 1981

s/ Jacob D. Fuchsberg
Associate Judge

---

* Description of Order: Order of the Appellate Term, First Department, dated May 11, 1981, affirming the judgment of the Criminal Court of the City of New York, rendered on November 20, 1979.

ORDER OF AFFIRMANCE DATED MAY 11, 1981

At an Appellate Term of the Supreme Court, First Department, held at the Court House, Borough of Manhattan, City of New York, on the 11th day of May 1981

Present:—Hon. EDWARD R. DUDLEY, P.J.
THOMAS J. HUGHES
SIDNEY H. ASCH
Justices

Docket No. N-923056

County Clerk's No. 49159 1980

Calendar No. 80-538

May 1981 Term

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

vs.

JOHN DOE a/k/a WALTER MUND,

Defendant-Appellant

An appeal having been taken to this court by defendant from a judgment of conviction of the Criminal Court of the City of New York, County of New York, after trial before Hon. John A.K. Bradley and jury, on the 20th day of November 1979, upon

the charge of violation of Penal Law §240.25; Admin. Code §1403.3-4.05, subd. 4 and having been sentenced by Hon. John A.K. Bradley on the 28th day of January, 1980, as follows: Penal Law §240.25 — $150 or 10 days; Admin. Code §1403.3-4.05, subd. 4 — $150 or 10 days and the said appeal having been heard and due deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED that the said judgment so appealed from be and the same is hereby affirmed.

The case is remitted to the Criminal Court of the City of New York, County of New York, for proceedings to direct defendant to surrender himself to said court in order that execution of the judgment be commenced or resumed. [CPL 460.50, subd. 5]

Enter

s/ E.R.D.
Justice Appellate Term
Supreme Court,
First Department

MEMORANDUM DECISION OF FIRST DEPARTMENT, APPELLATE TERM DATED MAY 14, 1981

80-538. PEOPLE, &C., res. v. JOHN DOE a/k/a Walter Mund, def-ap— Judgment of conviction rendered Jan. 28, 1980 (Bradley, J.) unanimously affirmed.

It was for the jury to assess whether defendant's repeated utterances, which were of a most obscene and threatening nature, were made "with intent to harass, annoy or alarm" the arresting police officers (Penal Law sec. 240.25, subd. 2), and we cannot say as a matter of law that the evidence failed to establish the violation beyond a reasonable doubt. While it may be true, as defendant suggests, that "police officers are no strangers to abusive language", this does not mean that police officers may be verbally abused with impunity by the citizens they serve.

The trial court should not have received testimony with respect to defendant's conduct at central booking, that incident not having been charged in the information. On this record, however, and in light of the court's own limiting instructions, the error was harmless (see People v. Cook, 42 N.Y. 2d 204). We have considered the remaining contentions advanced by defendant and find them lacking in merit.

The case is remitted to the Criminal Court of the City of New York, County of New York, for proceedings to direct defendant to surrender himself to said court in order that execution of the judgment be commenced or resumed (CPL 460.50, subd. 5).

Opposition

Office - Supreme Court, U.S.
FILED
SEP 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-193

IN THE

Supreme Court of the United States

October Term, 1981

WALTER MUND,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Term, First Department

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Constitutional and Statutory Provisions Involved

Omitted from petitioner's list of constitutional and statutory provisions involved is Section 1403.3-8.25 of the Administrative Code of New York City. The provision, which is of central importance in the case, provides in pertinent part as follows:

> §1403.3-8.25. *Criminal Penalties.*—
>
> • • •
>
> (e) Any person convicted of violating any of the provisions of this code or any regulation of the board not otherwise provided for in [subsections (a) through (d) of this section] shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars for the first offense, or by imprisonment for not more than thirty days or both, for a second offense, and by a fine of not less than four hundred dollars nor more than five thousand dollars or by imprisonment for not more than four months or both for a third or subsequent offense.

No. 81-193

IN THE

Supreme Court of the United States

October Term, 1981

WALTER MUND,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Term, First Department

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Petitioner Walter Mund seeks review of a judgment of the Criminal Court of the City of New York (BRADLEY, J.) rendered January 28, 1980. By that judgment, petitioner was convicted after a trial by jury of the offenses of harassment (Penal Law §240.25) and unlawfully operating a sound signal device (Administrative Code of the City of New York, Section 1403.3-4.05(4)). Petitioner received a

sentence of a $150 fine or 10 days imprisonment on each charge. By an order dated May 11, 1980, and not yet reported, the Appellate Term, First Department, unanimously affirmed the judgment against petitioner.* On June 19, 1981, leave to appeal the order of the Appellate Term to the New York Court of Appeals was denied.

Petitioner seeks a writ of certiorari from this Court, arguing that the harassment statute he was convicted of violating unconstitutionally proscribes, or at least chills, conduct which is protected by the First Amendment, that the administrative code provision he was convicted of violating is void-for-vagueness, and that the court's evidentiary ruling admitting certain allegedly prejudicial testimony denied him due process of law.

Statement of the Case

Petitioner's convictions stem from a series of events occurring on East 13th Street in Manhattan on the evening of April 16, 1979. The incident began when two police officers on routine patrol arrived at that location to investigate a citizen complaint of a car alarm ringing (24-25, 117, 127).** The Administrative Code of the City of New York requires that any car burglar alarm be devised to shut off automatically within ten minutes of being triggered. However, the car's alarm, according to residents of the neighborhood, had been ringing continuously for over an hour and a half (105-06, 147, 162-63).

* The order of May 11th was accompanied by a memorandum decision dated May 14, 1981, which has also not yet been reported.

** Citations are to the trial transcript.

Shortly after the officers arrived, petitioner appeared on the scene, unlocked the car, and shut off the alarm (42-45, 118-19, 127-28). One of the officers then approached him and asked to see his license and registration. Petitioner, an attorney, refused, and instead began to harangue both officers with a loud and continuous stream of vulgar names and expressions, ethnic and sexual slurs, and threats of reprisal (26-28, 117-21). He called one of the officers, who is of Puerto Rican descent, a "fuckin' spic," and called the other officer, a woman, a "fuckin' cunt" (28, 120). He told the officers that he "kn[e]w people in high places," that he "kn[e]w lawyers" and "kn[e]w judges," and that the officers were "going to have more fuckin' problems than [they could] handle" (28, 121).

When he persistently refused to produce identification, petitioner was arrested (28, 120-21). He resisted being handcuffed, however, and in fact shoved his 240-pound body against the female officer, knocking her into the patrol car (28-31, 121, 133-34). Eventually, petitioner was placed in the patrol car and driven to Central Booking, during which time his tirade of profanities and threats against the officers continued unabated (31-33, 122-23).

At Central Booking, petitioner continued his vulgar language and uncooperative behavior. He refused to be photographed, refused to be fingerprinted, and continued to refuse to give his name (34, 74, 123-24). He also threatened to strike a police officer with a telephone and had to be restrained by several officers (34-35, 124-25).

Petitioner was charged in an information filed April 17, 1979 with resisting arrest (Penal Law §205.30), obstructing

governmental administration (Penal Law §195.05), harassment (Penal Law §240.25), and unlawfully operating a sound signal device (Administrative Code, City of New York, Section 1403.3-4.05). A jury trial commenced on November 16, 1979 and concluded on November 20 with a verdict convicting petitioner of harassment and unlawfully operating a sound signal device and acquitting him of resisting arrest and obstructing governmental administration. Petitioner was sentenced on January 28, 1980.

POINT

This Court lacks jurisdiction to review petitioner's claims, because he failed to present those claims in the state courts and because the state courts failed to address them; in any event, petitioner's claims do not merit review by this Court.

In his petition to this Court, petitioner advances three claims. First, he contends that the provision of the New York harassment statute which prohibits the use in a public place of "abusive or obscene language" uttered with "intent to harass, annoy or alarm" violates the First and Fourteenth Amendments of the United States Constitution, both on its face and as applied to him. Second, he contends that the provision of the Administrative Code of the City of New York which establishes criminal penalties for the unlawful operation of a sound signal device is so vague that it does not provide fair notice that a criminal rather than a civil penalty is provided. Thus, he argues, his conviction under that provision violates the due process clause of the Fourteenth Amendment of the United States Con-

stitution. Finally, he contends that the trial court admitted irrelevant and prejudicial testimony concerning his conduct at Central Booking and thereby denied him a fair trial in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, even though the court admitted the testimony only on the issue of credibility.

This Court lacks jurisdiction to review petitioner's claims on certiorari because petitioner failed to present those claims to the state courts. In any event, none of his claims presents a question deserving review by this Court.

A. This Court lacks jurisdiction of petitioner's claims.

It is elementary that this Court has jurisdiction to review a state court judgment only if, at a minimum, a federal claim was "drawn in question" in the state courts. 28 U.S.C. §1257. A claim is "drawn in question" in state court only if the petitioner raised the claim "and the ground therefor" with "fair precision" and in "due time," or if the state courts actually considered the claim, despite its not having been raised. *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 67 (1928); *see Wilson* v. *Cook,* 327 U.S. 474, 483-84 (1946).

In this case, petitioner did not raise any issue of federal law in the state courts, and the courts did not address any. Petitioner failed, in either his brief to the Appellate Term or his application to the Court of Appeals, to raise his current claims with "fair precision." The claims which petitioner raised in the state courts were predicated exclusively on state law. Thus, for example, petitioner chal-

lenged his harassment conviction in state court by advancing arguments as to the proper interpretation of the statute and by asserting that the evidence was insufficient to support his conviction.* At no point did petitioner allege any violation of his federal constitutional rights or, in fact, even cite to the United States Constitution. Although after arguing for his interpretation of the harassment statute he added parenthetically that such an interpretation was "probably constitutionally mandated," and cited two federal cases,** that alone was obviously insufficient to apprise the courts with "fair precision" of the claim he advances now. *Herndon* v. *Georgia,* 295 U.S. 441, 442-43 (1935); *Harding* v. *Illinois,* 196 U.S. 78, 85-88 (1904).

Even if there were doubt that petitioner's current claim concerning the harassment statute was not presented with "fair precision" to the state courts by his bare parenthetical observation that his interpretation of the statute was "probably constitutionally mandated," the fact that the state courts failed to address his current claims, or any federal questions, conclusively indicates that those claims were not adequately raised. As this Court has held, such a failure by the state courts creates a presumption that "the omission was due to want of proper presentation," a presumption which it is petitioner's burden to overcome by affirmative showing in the record before this Court. *Street* v. *New York,* 394 U.S. 576, 582 (1969). Petitioner has failed

* Petitioner captioned his challenge "profanities uttered to a police officer do not constitute harassment," and concluded his brief by asserting that "the People have failed to make out a *prima facie* case of harassment." Defendant-Appellant's Brief to Appellate Term at 9, 15.

** Defendant-Appellant's Brief to Appellate Term at 9.

to overcome that presumption in this case, because he has failed, as required by Rule 21(h) of the Supreme Court Rules, to demonstrate in his petition the manner in which he raised his claims in the state courts, or to include with his petition the relevant portions of the state court record.

Petitioner similarly failed to challenge his administrative code conviction in state court on federal constitutional grounds. Rather, he simply argued that the proper interpretation of the state statute was that it created only a civil, not a criminal, penalty for unlawful operation of a sound signal device. Petitioner did not assert, as he does now, that the provision establishing a criminal penalty was vague or that his conviction violated due process, and did not cite to the United States Constitution or to any federal cases. Thus, the state courts had no opportunity to consider the claim he now advances.

Finally, petitioner also failed to raise his third claim in state court. Instead, he argued state law only, contending that the trial court had "erred" in admitting testimony concerning his conduct at Central Booking, that the testimony was "irrelevant" and "highly prejudicial," and that it "might very well have made the difference in the case." Defendant Appellant's Brief to Appellate Term at 13-14. He did not allege that he had been denied a fair trial or due process of law, and did not cite any federal cases or any provisions of the United States Constitution. Thus, his current, federal claim was not presented with "fair precision" to the state courts, and cannot be entertained by this Court. *Cardinal* v. *Louisiana*, 394 U.S. 437 (1969); *Wilson* v. *Cook*, 327 U.S. 474, 483-84 (1946).

B. Petitioner's claims do not merit review by this Court.

Even if petitioner had raised his claims in the state courts, his petition for certiorari should be denied, because the claims he raises do not merit review in this Court.

1. Petitioner's challenge to his harassment conviction does not merit review.

Petitioner was convicted of violating a provision of the New York harassment statute providing that it is unlawful to use "abusive or obscene language" in a public place with the intent to "harass, annoy, or alarm" another person. Penal Law §240.25(2). In challenging his conviction under that provision, petitioner contends both that the statute is overbroad and that it is unconstitutional as applied to his conduct. Petitioner's contentions, however, present no new issues of law meriting review in this Court.

In the first place, under prior decisions of this Court, the statute is plainly not overbroad. It is well-established, of course, that in evaluating possible overbreadth, a statute must be read in accordance with limiting interpretations of the state courts. *See Gooding* v. *Wilson,* 405 U.S. 518 (1972); *Lewis* v. *City of New Orleans,* 415 U.S. 130, 132-33 (1974). The New York courts have interpreted the provision of the harassment statute at issue in this case as proscribing only the utterance of "fighting words" within the meaning of *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942). *See, e.g., People* v. *Carvelas,* 75 Misc. 2d 616, 618 (App. Term, 1st Dept. 1973), *rev'd on other grounds,* 35 N.Y.2d 803; *People* v. *Cuomo,* 70 Misc. 2d 757 (Crim. Ct. N.Y. Co. 1972); *People* v. *Smolen,* 69 Misc. 2d 920 (Crim.

Ct. N.Y. Co. 1972); *People* v. *Benders*, 63 Misc. 2d 572 (City Ct. Buf. 1970). Thus, since the statute as interpreted by the New York courts does not proscribe language or conduct protected by the First Amendment, it is valid on its face. *See Lewis* v. *City of New Orleans*, 415 U.S. 130, 134 (1974). Review of petitioner's overbreadth claim would therefore present this Court with the opportunity to do little more than reaffirm the holdings of *Chaplinsky*, *Gooding*, and *Lewis*.

Petitioner's claim that the harassment statute could not constitutionally be applied to his conduct is also undeserving of review. Petitioner subjected the police officers to a lengthy tirade of vicious ethnic and sexual slurs and threats of reprisal, stretching over a substantial period of time on the street and thereafter. Included were vicious references to the hispanic officer as a "fuckin' spic" and to the female officer as a fuckin' cunt", terms which not only inflicted injury in themselves but were precisely the type of highly derogatory baiting which "tends to incite" breaches of the peace. *See Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942). But whether these particular words under the circumstances of this case were "fighting words" or were somehow protected is not an issue of any general importance requiring review by this Court.

2. *Petitioner's challenge to his administrative code conviction does not merit review.*

Petitioner was convicted of violating section 1403.3-4.05 of the New York Noise Control Code, which prohibits any car owner from having in operation on his car a burglar alarm incapable of shutting off automatically within ten

minutes of being triggered. Although not contesting that the requirements of the section are clear, petitioner asserts that the Noise Control Code does not clearly impose a criminal rather than civil penalty for a violation of the section, and argues that his conviction under the section therefore violates due process, since he did not receive fair warning of the possible penalty.

Petitioner's claim does not merit review by this Court, because it presents no issues of law not already decided by the Court, because it presents no set of facts of general import, and because it totally lacks merit. The standards for determining when a statute is "void-for-vagueness" have previously been adequately articulated by this Court. *See, e.g., United States* v. *Powell,* 423 U.S. 87, 92-94 (1975); *Grayned* v. *City of Rockford,* 408 U.S. 104, 108-09 (1972); *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 162 (1972). Petitioner's claim presents no occasion to reassess those standards, but only to apply them to an uncommon and relatively minor administrative regulation of little general interest. Moreover, his claim completely lacks merit, since the Noise Control Code clearly sets forth criminal penalties for violations of its provisions. Section 1403.3-8.25, in fact, is entitled "Criminal Penalties," and explicitly sets forth criminal penalties for all noise violations, penalties supplementing the concurrent civil penalties created in section 1403.3-8.01. Thus, petitioner's claim presents no substantial federal question for this Court to review.

3. Petitioner's claim that he was denied due process of law by the court's evidentiary ruling does not merit review.

Petitioner contends that the trial court erred under New York law when it admitted testimony of his conduct at Central Booking for impeachment purposes and that the testimony was so prejudicial that he was denied a fair trial in violation of the due process clause of the Fourteenth Amendment.* Petitioner's claim presents no substantial federal question for this Court to review. As this Court has recognized, evidentiary rules rarely, if ever, implicate the due process clause. *Spencer* v. *Texas,* 385 U.S. 554, 562, 564 (1967). There is certainly no due process issue here, since the court's ruling involved only a question of whether the probative value for impeachment purposes of testimony that petitioner's conduct had continued for some period outweighed the prejudicial effect of that testimony. Thus, petitioner's evidentiary claim, like his other claims, simply does not merit review by this Court.

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* The information charged petitioner with harassment on the basis of his conduct on East 13th Street.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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District Attorney
New York County

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JOSEPH J. SHEEHAN
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Of Counsel

September, 1981